

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE ROBERTSON,

Defendant-Appellant.

UNPUBLISHED

January 18, 2005

No. 246941

Wayne Circuit Court

LC No. 02-008246-01

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for carjacking, MCL 750.529a. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 22 ½ to 50 years' imprisonment for the carjacking conviction. We affirm.

Defendant first argues that the trial court abused its discretion by allowing a prior unarmed robbery conviction into evidence. We disagree. The trial court's decision to allow impeachment with prior convictions is within its sound discretion and will not be reversed on appeal, absent an abuse of that discretion. *People v McDaniel*, 256 Mich App 165, 167; 662 NW2d 101 (2003); *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

Prior convictions may be used to impeach a witness' credibility if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). MRE 609 provides, in part:

(a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

Crimes of theft are minimally probative and, therefore, are only admissible if the probative value outweighs the prejudicial effect. *People v Allen*, 429 Mich 558, 595-596; 420 NW2d 499, amended sub nom *People v Pedrin*, 430 Mich 1201 (1988). A robbery conviction is admissible under MRE 609 if it satisfies the *Allen* balancing test because it contains an element of theft. *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). The probative value and prejudicial effects are to be measured by the following factors:

(b) Determining Probative Value and Prejudicial Effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor. [MRE 609(b).]

A trial court's failure to articulate its analysis on the record is error, but the error does not require reversal if it appears from the record that the court was aware of the relevant factors and its discretion. *McDaniel*, *supra* at 168.

In the instant case, the issue of defendant's credibility was raised during his cross-examination, and the trial court ruled that the prior robbery conviction was relevant to his credibility and therefore admissible. Under the circumstances, we conclude that the trial court did not abuse its discretion in admitting the prior conviction. Defendant's credibility was a key factor to the defense because defendant was attempting to give an alternate theory of the case. Although defendant's unarmed robbery conviction has lower probative value regarding veracity than other theft offenses, theft is an element of robbery and an indicator that defendant is of dishonest character and may not testify truthfully. *Allen*, *supra* at 612. The evidence was more probative than prejudicial. *Id.* Although the trial court erred by not articulating the specific reasons why the probative value of the prior conviction outweighed its prejudicial effect under the *Allen* balancing test, the trial court did expressly state that it was relevant to defendant's credibility under MRE 609, which includes the balancing test. It is evident from the record that the trial court was aware of the factors and did not abuse its discretion by admitting this evidence for purposes of impeachment.

Next, defendant argues that the trial court abused its discretion in denying defendant's motion for a new trial. We disagree.

A decision on a motion for a new trial will not be reversed absent an abuse of discretion by the trial court. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A new trial may be granted on all or some of the issues when the substantial rights of a party were materially affected and there was:

(f) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial. [MCR 2.611(A)(1)(f); see also MCL 600.6098(2).]

To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *Cress, supra* at 692. Further, the trial court may evaluate credibility in deciding a motion for new trial. *Id.*; *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). The trial court's factual findings are reviewed for clear error under MCR 2.613(C), *Cress, supra* at 691, and with due regard for the trial court's opportunity to appraise credibility. *People v Canter*, 197 Mich App 550, 559-560; 496 NW2d 336 (1992).

In this case, defendant offered, what he termed, newly discovered evidence regarding Divron Bell, defendant's co-conspirator. At the time of trial, Bell took the stand, but claimed his Fifth Amendment right to remain silent because he had charges stemming out of the same incident pending against him. At the post-trial motion hearing regarding newly discovered evidence, Bell testified on behalf of defendant.

At the close of the hearing, the trial court concluded that the evidence was not newly discovered because there was testimony of ongoing conversations about the case. The court noted that defendant was aware of what Bell would say because he called him in the case in chief. The trial court further noted that Bell's testimony did not fully comport with defendant's testimony, indicating that it would not likely result in a different outcome. Further, to the extent that it did match defendant's testimony, the trial court found the testimony to be cumulative. The trial court did find that the evidence could not be produced through due diligence, but ultimately denied defendant's motion for a new trial. We discern no abuse of discretion in the trial court's decision.

First, the evidence itself, and not merely its materiality, was not newly discovered. *Cress, supra* at 692. Bell stated that defendant had spoken to him about the case while they were in a holding cell. Although Bell stated that defendant had not asked him to testify until days before the motion for a new trial, it reasonably can be inferred that defendant knew the content of his testimony because he called Bell to the stand at trial. Second, the evidence was merely cumulative. *Cress, supra* at 692. Bell's testimony regarding the crimes mirrored defendant's testimony. Defendant's theory of the case was that it was Bell and Gratton who were involved in the robbery, and that he was just in the van with a girl. To the extent that defendant testified on his own behalf at trial, the testimony of Bell is cumulative. Third, inclusion of the new evidence on retrial would probably not cause a different result. *Id.* The discrepancies between the testimony of Bell and defendant, regarding meeting in the neighborhood after the crime and certain details of the crime, tend to make defendant's testimony less credible. Defendant testified that he took the van alone after the robbery and dropped off a girl and then was called to meet up with Bell. Bell testified that defendant and Gratton were together in the van and were told to meet him in his neighborhood. The trial court may consider Bell's credibility in deciding a motion for a new trial based on newly discovered evidence. Finally, although defendant could not with reasonable diligence have discovered and produced the evidence at trial, it was not an abuse of discretion for the trial court to deny the motion for a new trial where the witness'

testimony was not credible, the testimony was cumulative, and it was not newly discovered.
Cress, supra.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder